STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 30, 2000
v	No. 220753 Kent Circuit Court
KEENAN SHIELDS, Defendant-Appellant.	LC No. 98-006318-FH

Before: Smolenski, P.J., and Zahra and Collins, JJ.

PER CURIAM.

Defendant was convicted by a jury of possession with intent to deliver less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv). He was sentenced as a fourth habitual offender, MCL 769.12; MSA 28.1084, and second drug offender, MCL 333.7413; MSA 14.15(7413), to two to forty years' imprisonment. Defendant appeals as of right. We affirm.

Defendant first argues that he was deprived a fair trial because the prosecution suppressed and failed to preserve a 911 tape recording and a surveillance videotape that contained exculpatory evidence. We disagree.

Pursuant to MCR 6.201(A), a party, upon request, must provide all other parties with information that is not protected from disclosure under MCR 6.201(C). Further, MCR 6.201(B) states that, upon request, the prosecution must provide a defendant with information known to the prosecution. Principles of due process require disclosure of evidence in the prosecution's possession that is exculpatory and material, regardless of whether the defendant requests the disclosure. *People v Stanaway*, 446 Mich 643, 666; 521 NW2d 557 (1994). However, due process does not require the police or prosecution to seek and find exculpatory evidence. *People v Sawyer*, 222 Mich App 1, 6; 564 NW2d 62 (1997).

In the present case, defendant contends that the prosecution suppressed and failed to preserve a recording of a 911 call made prior to his arrest. Defendant was arrested on May 31, 1998, and made his initial discovery request on June 15, 1998. That discovery request, however, did not list the 911 tape. Defendant first requested "a copy of the 911 tape and/or dispatch log" in his January 4, 1999,

motion to produce. Thereafter, on January 8, 1999, the trial court issued an order requiring the prosecutor to produce the "911 tape &/or dispatch log." According to Grand Rapids Vice Detective Bill Keiser, the police could not provide the 911 tape defendant requested because it had been recorded over after ninety days.

Defendant claims that the 911 tape would have been useful in cross-examining the police officers regarding the description they were given of the suspect. However, defendant acknowledged at trial that he was wearing a light blue coat, hat and shirt, which essentially matched the description the arresting officers claimed they were given when they were dispatched to the scene. Consequently, there is no indication the 911 tape contained material, exculpatory evidence. The prosecution has no duty to preserve evidence that is merely "potentially useful evidence" unless a defendant can show bad faith on the part of the police. *People v Leigh (On Remand)*, 182 Mich App 96, 98; 451 NW2d 512 (1989). Defendant has not shown bad faith in this case. Specifically, there is no evidence disputing the claim by the police that the tape was recorded over after ninety days and no evidence suggesting such action was not in line with normal department policy. Under these circumstances, we conclude that defendant's inability to obtain the 911 tape did not deprive him of a fair trial.

Defendant also contends that the prosecution unfairly suppressed or lost a surveillance videotape of the parking lot where he was arrested. We note that defendant never specifically requested the videotape below in any of his discovery motions. Defendant first requested the videotape at the trial. The trial testimony of an employee of the apartment complex where defendant was arrested suggested a surveillance camera filmed portions of the complex's parking lot on the date of defendant's arrest. The employee claimed that the videotape had been set aside for the police. According to Detective Keiser, however, the police never obtained the tape. A private investigator hired by defendant testified that she investigated the existence and whereabouts of the videotape and concluded the police had provided defendant all evidence that was in their possession. There was no testimony regarding what the videotape depicted and there is nothing to suggest the videotape contained material, exculpatory evidence. The prosecution did not have a duty to preserve the evidence merely because it was "potentially useful evidence." *Leigh, supra*. Under these circumstances, we conclude that defendant's inability to obtain the videotape did not deprive him of a fair trial.

Defendant next argues that there was insufficient evidence to support his conviction. We disagree. When reviewing the sufficiency of the evidence in a criminal case, we must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992); *People v Griffin*, 235 Mich App 27, 31; 597 NW2d 176 (1999). To prove possession with intent to deliver less than fifty grams of a controlled substance, the prosecution must show: (1) the substance in the defendant's control was a controlled substance; (2) the amount of the substance found weighed less than fifty grams; (3) the defendant's possession of the substance was unauthorized; (4) the defendant knowingly possessed the substance with an intent to deliver. *People v Wolfe*, 440 Mich 508, 516-517; 489 NW2d 748 (1992). In the present case, defendant only challenges the sufficiency of evidence that he possessed the cocaine.

Physical possession is not required to find an individual guilty of possessing a controlled substance. *People v Fetterley*, 229 Mich App 511, 515; 583 NW2d 199. "Possession may be either actual or constructive, and may be joint as well as exclusive." *Id*. A defendant may be said to have constructive possession of contraband when the totality of the circumstances indicate a sufficient nexus between the defendant and the contraband. *Wolfe, supra* at 521. "The essential question is whether the defendant had dominion or control over the controlled substance." *Fetterley, supra* at 515. It is not necessary that an individual own the premises where narcotics are found, see *Wolfe, supra* at 520-524, or be the actual owner of the recovered substance to be said to have possessed it, *Id*. at 520. Possession with intent to deliver may be proved by circumstantial evidence and inferences arising therefrom. *Id*. at 526; *Fetterley, supra* at 515.

Here, there is ample evidence from which a rational trier of fact could conclude beyond a reasonable doubt that defendant constructively possessed the crack cocaine found near the scene of his arrest. Grand Rapids Police Officers Todd Hudson and Scott Vogrig testified that they were separately dispatched to an apartment complex to investigate a complaint that a black male wearing a light blue hat and shirt and blue jeans possessed a gun. When the officers arrived at the complex, they saw defendant and four other young men standing on some steps in the corner of the parking lot. Defendant matched the description the officers had been given. Both officers testified that, when they ordered the young men to put their hands in the air, defendant walked behind a three-foot-high wall and momentarily bent down out of the officers' view. Defendant then came back around the wall and stood amongst the other four men. After detaining the men, the officers searched the area behind the wall. Officer Hudson testified that he found three plastic sandwich bags containing a white substance under a sock on the concrete walkway where defendant had bent down. The substance field tested positive for cocaine and defendant was arrested. Upon searching defendant, the officers discovered a cell phone and $245 cash. According to Officer Hudson, defendant provided unsolicited, inconsistent statements while he was being transported to jail. Defendant first stated that the drugs were not his, that he did not know the officers were police officers when they arrived and that he hid behind the wall because he thought he was going to be robbed. Defendant later told Officer Hudson that he was "just sitting there behind the wall" when the police arrived. A crime lab specialist testified that the three bags were found to contain a total of approximately 9.9 grams of crack cocaine.

Defendant testified at trial that he was wearing a light blue coat, hat and shirt and was standing on the steps when the police arrived. He claimed, however, that he did not possess the cocaine and had bent down behind the wall to pour out a beer when he saw the police officers. "[T]he prosecution need not negate every reasonable theory of innocence, but must only prove its own theory beyond a reasonable doubt in the face of whatever contradictory evidence is presented." *Fetterley, supra* at 517. Despite defendant's testimony denying possession of the cocaine, the evidence, viewed in light most favorable to the prosecution, allowed for the reasonable inference that there was a sufficient nexus between defendant and the cocaine and that defendant exerted dominion and control over the cocaine.

See *Wolfe, supra* at 521; *Fetterley, supra* at 515. Therefore, there was sufficient evidence to find that defendant committed the charged offense.[1]

Last, defendant argues that he was deprived a fair trial when the prosecution asked him during cross-examination if his girlfriend had visited him "at the jail." Defendant contends he was prejudiced because the question left jurors to speculate as to why he was in jail. Defendant did not object to the question below and, thus, has failed to preserve this issue for our review. We decline to review the unpreserved instance of alleged prosecutorial misconduct because any prejudice caused by the statement could have been cured by a cautionary instruction below and failure to review the issue will not result in manifest injustice. *Stanaway, supra* at 687; *People v Cooper*, 236 Mich App 643, 650; 601 NW2d 409 (1999). We note that prejudice was unlikely given that the jury was made aware defendant was in jail prior to the complained-of question. Officer Hudson had testified prior that defendant made several unsolicited statements while being transported to jail, and that defendant's cash and cell phone were inventoried upon arriving at the jail. Moreover, it is logical for jurors to expect that a criminal defendant, while awaiting trial, had either posted bond or had been incarcerated in jail.

Affirmed.

/s/ Michael R. Smolenski
/s/ Brian K. Zahra
/s/ Jeffrey G. Collins

[1] Although defendant does not specifically challenge the evidence supporting the finding that he possessed the cocaine with an intent to deliver, we note that actual delivery of narcotics is not required to prove intent to deliver. *Wolfe, supra* at 524. Intent to deliver may be inferred from the quantity of drugs the defendant possesses, the packaging of the narcotics and other circumstances surrounding the arrest. *Id*. Here, defendant's possession of the three sandwich bags containing individual rocks of cocaine totaling 9.9 grams, his possession of a cell phone and a large quantity of cash, and his conduct of attempting to hide the bags all suggest defendant had the necessary intent to deliver the cocaine.